Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	**MM Docket No. 01-235**
	)	
Newspaper/Radio Cross-Ownership Waiver Policy	)	**MM Docket No. 96-197**
	)	

Comments of
CARIBBEAN INTERNATIONAL NEWS CORPORATION

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SUMMARY OF COMMENTS

Caribbean International News Corporation ("Caribbean") requests that the Federal Communications Commission ("Commission" or "FCC") revise the newspaper/broadcast cross-ownership rule, Section 73.3555(d) of the Commission's Rules, to reflect the competitive realities of today's media markets:

1. As the Commission reexamines the newspaper/broadcast cross-ownership rule, it should be guided by the original purposes of the rule: to preserve diversity and competition, consistent with the Commission's statutory public interest mandate.

2. The Commission should promulgate an empirical cross-ownership analysis designed to reliably protect diversity of ownership and viewpoints. The new analysis Caribbean proposes will allow an entity to jointly own or control a daily newspaper and a radio station or television station in the same market only if that entity holds less than an approximate 70% share of the advertising revenues for a media market sector. Advertising revenue is an objective measure of viability as a market presence for a newspaper or broadcast outlet. It is established that control of approximately 70% or more of a market sector is presumed to be monopoly control. Thus, if a single entity has consolidated this level of market power within a media market sector, it is reasonable to conclude that this market control will be leveraged into other traditional media sectors, putting diversity in the market at risk. Local newspaper advertising comprises on average as much as 59% of overall local advertising among the traditional media market sectors, justifying a continued examination of newspaper/television and newspaper/radio combinations.

3. The Commission should further confirm for purposes of Section 73.355(d) that it always has defined "daily newspapers" in Puerto Rico to include Spanish-language newspapers and thus has applied the newspaper/broadcast cross-ownership rule to prohibit the combination of a Spanish-language daily newspaper and a broadcast station in the Commonwealth of Puerto Rico. An opposite conclusion would produce the unintended result of rendering the cross-ownership rule meaningless in Puerto Rico.

4. The Commission should recognize that the Puerto Rico media market is a fragmented local market characterized by the presence of one dominant entity that owns two daily newspapers and by many smaller newspapers, radio outlets, and television outlets. Puerto Rico's advertising market would lack sufficient competition if the cross-ownership rule were totally abolished, and viewpoint diversity would be irreparably harmed.

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Caribbean International News Corporation ("Caribbean"), pursuant to Section 1.415 of the Commission's Rules, hereby submits comments in response to the Federal Communications Commission's (the "Commission" or "FCC") Notice of Proposed Rule Making to reexamine the newspaper/broadcast cross-ownership rule, Section 73.3555(d) of the Commission's Rules.[1]

I. INTRODUCTION

Section 73.3555(d) of the Commission's Rules, in its current form, is an absolute prohibition on cross-ownership of a daily newspaper and broadcast station in the same market. Caribbean, which publishes El Vocero de Puerto Rico ("El Vocero"), one of four daily newspapers in Puerto Rico, urges the Commission to liberalize the

[1] *In re Cross-Ownership of Broadcast Stations and Newspapers, Newspaper/Radio Cross-Ownership Waiver Policy*, Order and Notice of Proposed Rule Making, MM Dkt. Nos. 01-235, 96-197 (rel. Sept. 20, 2001) ("*NPRM*").

newspaper/broadcast cross-ownership rule. The Commission should replace the existing rule with a more flexible analytical framework that satisfies the Commission's statutory public interest responsibilities under Sections 1, 307(c), 309(a), and 310(d) of the Communications Act of 1934, as amended.[2] The Commission should adopt a new standard that narrowly targets those local media markets where ownership and/or working control of a media market sector is concentrated in a single dominant entity. Under such an analysis, for example, if the owner of one or more daily newspapers in a local media market holds approximately 70% or more of the advertising market share in the daily newspaper market sector—either through individual or common ownership, through direct ownership or affiliates, through direct control or management, or through actual control—then the newspaper entity should be prohibited from acquiring a broadcast outlet until concentration is diluted.

Newspaper print advertising plays a critical role in where advertisers spend media dollars, thus justifying a continued examination of newspaper/television and newspaper/radio combinations. In light of this, a dominant newspaper entity acquiring a broadcast outlet is likely to significantly affect the ability of other media outlets to compete for a common pool of advertising revenues. The local media market in Puerto Rico represents an extreme—although not entirely unique—example of a local media market that would witness a dramatic reduction in the viability of competing media outlets if the Commission eliminates the cross-ownership rule without adopting a new rule that better reflects the realities of today's local media markets. Thus, a flexible and

[2] *See* 47 U.S.C. §§ 151, 307(c), 309(a), 310(d).

targeted standard should recognize where a media outlet owner already controls what is effectively approaching monopoly power in a media market sector, as measured by advertising revenue or volume. This standard should prevent a dominant outlet owner in a local media market like Puerto Rico from cross-owning a daily newspaper and a broadcast station.

Caribbean also seeks confirmation that the Commission always has defined "daily newspapers" in Puerto Rico, for purposes of Section 73.3555(d), to include Spanish-language newspapers and thus has applied the newspaper/broadcast cross-ownership rule to prohibit the combination of a Spanish-language daily newspaper and a broadcast station in the Commonwealth of Puerto Rico. Such application of the newspaper/broadcast cross-ownership rule recognizes that Spanish is an official language of Puerto Rico, that the most widely-circulated daily newspapers in Puerto Rico are published in Spanish, and that the Commission specifically intended to apply the rule to Puerto Rico.

II. THE ORIGINAL PUBLIC INTEREST OBJECTIVES OF THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE SHOULD CONTINUE TO GUIDE THE COMMISSION AS IT REDESIGNS THE RULE

The newspaper/broadcast cross-ownership rule prohibits the common ownership of a full-service broadcast station (radio or television) and a daily newspaper when the broadcast station's service contour encompasses the newspaper's city of publication.[3] As

[3] 47 C.F.R. § 73.3555(d). For AM radio stations, the service contour is the 2mV/m contour; for FM radio stations, the service contour is the 1mV/m contour; and for TV stations, the service contour is the Grade A contour. 47 C.F.R. § 73.3555(d)(1)-(d)(3).

is well recognized, the Commission promulgated the cross-ownership rule in 1975 to promote two fundamental goals: *diversity* and *competition*.[4]

For more than fifty years, the United States Supreme Court and the Commission repeatedly have found that diverse and antagonistic sources promote divergent views, a goal that "is essential to a democracy."[5] In 1978, the Supreme Court upheld the newspaper/broadcast cross-ownership rule against a First Amendment challenge, expressly concluding that "the Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints."[6] As the Commission more recently observed, the "viewpoint diversity objective promotes a goal the Supreme Court has stated underlies the First Amendment … [which] 'rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public….'"[7]

In addition to the goal of diversity, the goal of fostering competition has guided the Commission's multiple ownership rules. The Commission emphasized that

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[4] *See NPRM* ¶ 2 (citing *In re Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Second Report and Order, 50 FCC 2d 1046 (1975) ("*Cross-Ownership Second Report and Order*") *recon.* 53 FCC 2d 589 (1975), *aff'd sub nom. FCC* v. *Nat'l Citizens Comm. for Broad.*, 436 U.S. 775 (1978).

[5] *NPRM* ¶ 2 (quotation and citation omitted).

[6] *Nat'l Citizens Comm. for Broad.*, 436 U.S. at 796.

[7] *In re 1998 Biennial Regulatory Review—Review of the Commission's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Inquiry, 13 FCC Rcd. 11,276, ¶ 4 (1998) ("*1998 Notice of Inquiry*") (quoting *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945)).

"[c]ompetition is an important part of the Commission's public interest mandate because it promotes consumer welfare and the efficient use of resources."[8]

The Commission is reviewing the newspaper/broadcast cross-ownership rule as part of a wider reexamination of various broadcast ownership rules.[9] In the course of this wider reexamination, the Commission concluded specifically in 2000 that the newspaper/broadcast cross-ownership rule continues to serve the public interest because it furthers diversity, and therefore the rule should be retained.[10] Nonetheless, the Commission recognized that there may be certain instances where a confluence of factors could ensure sufficient diversity and competition in a market despite a newspaper/broadcast combination.[11] The Commission asked for comment on whether in these specific instances, the cross-ownership rule might be unnecessary to achieve the intended public interest benefits.[12]

Caribbean contends that a reexamination—and revision—of the cross-ownership rule should incorporate exactly this type of flexible, market-based approach. Caribbean advocates the adoption of a cross-ownership analysis that employs standards targeted at local media markets where a media outlet owner holds an objectively dominant market

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[8] *Id*.

[9] *See In re 1998 Biennial Regulatory Review—Review of the Commission's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report, 15 FCC Rcd. 11,058 (2000) ("*Biennial Regulatory Review Report*"); *see also In re Review of the Commission's Regulations Governing Television Broad.*, Report and Order, 14 FCC Rcd. 12,903 (1999).

[10] *Biennial Regulatory Review Report*, *supra* note 9, ¶¶ 89-93; *see NPRM* ¶ 7.

[11] *NPRM* ¶ 7.

[12] *Id.*

position in a media market sector. As discussed in detail below, Puerto Rico is an illustration of such a local market.

III. THE PUERTO RICO MEDIA MARKET IS A FRAGMENTED LOCAL MARKET CHARACTERIZED BY THE PRESENCE OF ONE DOMINANT ENTITY THAT OWNS TWO DAILY NEWSPAPERS AND BY MANY SMALLER NEWSPAPERS, RADIO OUTLETS, AND TELEVISION OUTLETS

A. Puerto Rico Media Market

1. Defining the Relevant Geographic Market

In reviewing the newspaper/broadcast cross-ownership rule, the Commission has sought comment on how it should define the relevant geographic market.[13] The relevant geographic market generally "refers to the area where buyers of the particular product can practicably turn for alternative sources of supply, or the area in which sellers sell this product."[14] Under the current newspaper/broadcast cross-ownership rule, the Commission defines the relevant geographic market as the local media market, *i.e.*, the area in which the broadcast station's service contour encompasses the entire community in which the newspaper is published.[15]

The Commission has treated the entire island of Puerto Rico as one geographic market for purposes of its other media ownership rules. For instance, in a recent decision addressing the television duopoly rules, the Commission explained that "past precedent and local economic and market conditions support continued treatment of the island of

[13] *Id.* ¶ 23.

[14] *In re Revision of Radio Rules and Policies*, Second Memorandum Opinion and Order, 9 FCC Rcd. 7,183, ¶ 10 (1994).

[15] *NPRM* ¶ 23.

Puerto Rico as one television market."[16] Other Commission decisions similarly define Puerto Rico as a single television market.[17] Moreover, a recent Commission review of the radio industry classifies Puerto Rico as a single radio market.[18] This approach is consistent with industry analysts, such as Arbitron, Inc. and BIA Research, Inc., which classify the island of Puerto Rico as a single market in their media research studies.

Classification of Puerto Rico as a single geographic market for purposes of the newspaper/broadcast cross-ownership rule is further supported by the fact that all four daily newspapers in Puerto Rico compete and provide coverage of local news events across the entire island of Puerto Rico. Moreover, under antitrust analysis, Puerto Rico should be considered one geographic market because advertisers could not reasonably respond to an advertising price increase by shifting to alternative suppliers located outside Puerto Rico.[19] Thus, the Commission should define the relevant geographic market as the entire island of Puerto Rico for purposes of the newspaper/broadcast cross-ownership rule. Caribbean therefore provides data below regarding the Puerto Rico media market.[20]

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[16] *In re Paxson Communications of San Juan, Inc. and Lin Television Corp.*, Memorandum Opinion and Order, 16 FCC Rcd. 14,139, ¶ 6 (2001).

[17] *See*, *e.g.*, *In re Pegasus Cable Television of San German, Inc. and MCT Cablevision, Ltd. P'ship*, First Report and Order, CSR-5420-A, 1999 WL 976711 (rel. Oct. 28, 1999); *In re Jem Communications, Inc. Interstate Gen. Props. Ltd. P'ship, S.E.*, Memorandum Opinion and Order, 9 FCC Rcd. 4,874 (1994); *In re Application of Canal 48, Inc. & Int'l Broad. Corp.*, Memorandum Opinion and Order, 8 FCC Rcd. 2,193 (1993).

[18] *See* Mass Media Bureau, Policy and Rules Div., FCC, *Review of the Radio Industry, 2001* at App. F (2001).

[19] *See NPRM* ¶ 23.

[20] In the *NPRM*, the Commission requests that commentators provide data upon which the Commission may rely in its reexamination of the newspaper/broadcast cross-ownership rule.

2. <u>Defining the Relevant Market</u>

The Commission has stated that it will examine the *economic impact* of maintaining or modifying the newspaper/broadcast cross-ownership rule. In doing so, the Commission explained that it will "focus on the primary economic market in which broadcast stations and newspapers compete: *advertising*."[21]

Caribbean believes that there is not a more relevant or accurate measure of economic competition and diversity than advertising market share. In any media market, there is a quantifiable and limited pool of advertising dollars, which is divided among various media outlets. Advertising revenue is the means by which broadcasters and newspapers remain viable outlets for local news and information, and such outlets are the lifeblood of diversity.[22]

In contrast, determining market share based upon circulation or ratings data would prove a daunting task. It is extremely difficult to devise an accurate method of comparing newspaper circulation and radio or television ratings, especially for markets such as Puerto Rico, where Nielsen does not provide television ratings information.[23] Moreover, many stations with low audience ratings may enjoy a disproportionately large share of the advertising market because the station attracts affluent listeners. On the other hand, stations with high audience shares may have poor demographic compositions

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[21] *NPRM* ¶ 19.

[22] *See In re Review of the Commission's Regulations Governing Attribution of Broad. and Cable/MDS Interests*, Report and Order, 14 FCC Rcd. 12,559 (1999) (separate statement of then-Commissioner Michael K. Powell discussing correlation of advertising rates to viability of media outlets and local news competition and diversity).

[23] *See NPRM* ¶ 24.

resulting in a smaller share of the advertising market. Therefore, because the relevant economic market should be defined by advertising revenue, Caribbean offers data and analysis about the local media advertising market in Puerto Rico.

3. Factual Analysis of the Local Media Market in Puerto Rico

a. Demographics of Puerto Rico

Puerto Rico is a commonwealth of the United States situated in the Caribbean Sea. It has a population of 3.9 million people.[24]

Puerto Rico is an exceptionally poor island. According to the 1990 Census, almost 59% of the population live below the poverty line.[25] The income levels in Puerto Rico further reflect the island's poverty. Per capita income in Puerto Rico is $8,914.[26] The average household income is only $25,425.[27]

Another factor that distinguishes Puerto Rico from the U.S. mainland is the predominance of the Spanish language throughout society. Spanish is an official language of the Commonwealth of Puerto Rico.[28] Only 25% of all Puerto Ricans speak

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[24] *See CIA – The World Factbook – Puerto Rico* ("*CIA World Factbook*"), *at* http://www.odci.gov/cia/publications/factbook/geos/rq.html (last visited Nov. 8, 2001).

[25] U.S. Dep't of Commerce, 1990 Census of Population, Social & Economic Characteristics: Puerto Rico 21 (1990).

[26] BIA Research, Inc., *Investing in Radio 2001* (1st ed. 2001); BIA Research, Inc. *Investing in Television 2001* (1st ed. 2001).

[27] *Id*.

[28] The 2000 Census indicates that 98.9% of Puerto Rico's population of any race identify themselves as Hispanic or Latino. According to the 1990 Census, 72% of the population of Puerto Rico speak *only* Spanish at home. Furthermore, the Puerto Rican agency that oversees telecommunications regulations—Junta Reglamentadora de Telecomunicaciones de Puerto Rico—posts it website in Spanish only without the option of an English version. *See* http://www.jrtpr.gobierno.pr (last visited Nov. 23, 2001).

English, and just 10% of Puerto Rican high school graduates speak English well.[29] Moreover, since 1949, public school classes in Puerto Rico have been taught in Spanish.[30]

The predominance of Spanish in Puerto Rican society is reflected in the media as well. El Nuevo Día, El Vocero, and Primera Hora—the three daily newspapers with the highest levels of net paid circulation in Puerto Rico—are all Spanish-language.[31] In fact, the collective net paid circulation of the three Spanish-language daily newspapers serving Puerto Rico is approximately ten times the circulation of the only English-language daily newspaper, the San Juan Star.

b. <u>Traditional Media Outlets</u>

Puerto Rico has a diverse local media market, primarily comprised of traditional media.[32] The local media market in Puerto Rico is unique in that many small,

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[29] *See Fight Over English-Only Monopolizes House Debate Over Puerto Rico's Future*, LatinoLink News Servs., Mar. 4, 1998, *at* http://tc.unl.edu/enemeth/puerto-lang.html.

[30] *Id*. *See also* National Ctr. for Pub. Policy Research, *Facts About Puerto Rico Statehood*, *at* http://www.nationalcenter.org/PuertoRicoFacts898.html (last visited May 18, 2001).

[31] For the six-month period preceding September 30, 2000, the net paid circulation of El Nuevo Día was 200,484. Excluding the net paid Saturday circulation of El Vocero and Primera Hora, their net paid circulations were 156,051 and 80,885, respectively. The San Juan Star, the only daily newspaper in Puerto Rico that is published in English, reports that its daily circulation for the year 2000 was 50,000 readers. The San Juan Star also publishes a Spanish version of its daily newspaper.

[32] According to an industry study of the Puerto Rico media market commissioned by Ferré Investment Fund ("Ferré"), Puerto Ricans rely on the following sources for their local news (by percentage): daily newspapers—74% (of which El Nuevo Día alone commands 47%); television—52%; cable television—8%; radio—5%; weekly newspapers—2%; and Internet—1%. Clark, Martire & Bartolomeo, Inc., *Estudio de Lectoría de Periódicos de Puerto Rico*, at 40 (2000) *("Study of Newspaper Readership in Puerto Rico")*. Clark, Martire & Bartolomeo, Inc. is a firm specializing in studies concerning methods of communications. In recent years, the firm has completed studies for more than fifty periodicals.

independent owners compete in the television, radio, and newspaper market sectors for a relatively small amount of advertising dollars. At the same time, however, one entity controls 43% of the overall media advertising dollars, threatening the viability of both the market's diversity and competition through further expansion of its media market power.

(i) Television

There are 1,021,000 television households in Puerto Rico.[33] Thirty-one television stations are licensed to offer service in Puerto Rico.[34] Twenty-four distinct entities own these thirty-one stations.[35] In addition, at least sixteen of these stations are not affiliated with a national network or PBS. Estimated gross television advertising revenues for 2000 totaled $114.9 million.[36]

(ii) Radio

The radio market in Puerto Rico enjoys similar levels of diversity. According to a recent Commission study on the radio industry, there are eighty-nine radio stations

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[33] *Investing in Television 2001*, *supra* note 26. The number of television households is relatively small for the population. Other areas, such as Portland, Oregon or Baltimore, Maryland, with similar figures for television households passed, have populations of more than a million fewer people than Puerto Rico. *See* notes 66, 75 and 76, *infra*, and accompanying text.

[34] Bowker, *Broadcasting & Cable Yearbook 2001*, B-90-91 (2001); Warren Communications News, *TV & Cable Factbook 2001*, Stations Vol. 2, A-1427-48, A1515-16 (2001); *Investing in Television 2001*, *supra* note 26; FCC CDBS Electronic Filing System, *at* http://svartifoss2.fcc.gov/prod/cdbs/pubacc/prod/cdbs_pa.htm (last visited Nov. 29, 2001).

[35] *Id*.

[36] *Investing in Television 2001*, *supra* note 26.

licensed in Puerto Rico.[37] Fifty-six distinct entities own these radio stations. Estimated gross radio advertising revenue for Puerto Rico in 2000 was $172 million.[38]

(iii) <u>Newspapers</u>

As mentioned briefly above, there are four daily newspapers in Puerto Rico: El Nuevo Día, El Vocero, Primera Hora, and the San Juan Star. The only daily newspaper published in English is the San Juan Star. The newspapers with the first and third highest readerships—El Nuevo Día and Primera Hora—are controlled by Ferré. It is estimated that in the year 2000 in Puerto Rico, Ferré commanded approximately 83% of the daily Spanish-language newspaper advertising volume, 72% of the newspaper advertising revenue, and 43% of the total advertising revenue for all traditional media market sectors.[39]

c. <u>"New Media" Outlets</u>

The Commission also requested information about emerging media outlets and their effect on diversity and competition in the local media markets. Caribbean offers

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37 *Review of the Radio Industry, 2001*, *supra* note 18. Caribbean's independent research of the radio industry calculated that 78 AM stations and 65 FM stations were licensed, for a total of 143 radio stations in Puerto Rico.

38 *Investing in Radio 2001*, *supra* note 26.

39 The combined estimated gross revenue for the year 2000 for all radio stations licensed in Puerto Rico was $114,900,000, and the combined estimated gross revenue for the year 2000 for all television stations licensed in Puerto Rico was $172,000,000. The revenue derived from advertising volume of Puerto Rico's daily newspapers during 2000 was $437,728,117—almost four times the revenue of all the radio stations and more than 2.5 times the revenue of the television stations. Of the $437,728,117 in newspaper advertising revenue, $315,264,262 (more than the total broadcasting advertising revenue) is attributed to the combined advertising revenues of Ferré's two daily newspapers. Moreover, in the year 2000, Ferré's two daily newspapers ran 4,820,171 column inches of advertising, while Caribbean's newspaper, El Vocero, ran only 969,348 column inches of advertising. *See Investing in Radio 2001*, *supra* note 26; *Investing in Television 2001*, *supra* note 26; Media Fax, Inc., *AdTrac Commercial Monitoring Service*.

information regarding cable television, direct broadcast satellite ("DBS") service, and the Internet in Puerto Rico.

(i) <u>Cable Television</u>

There are 601,192 cable television subscribers in Puerto Rico.[40] Cable television passes 772,062 television households, which is a 76% penetration rate.[41] In addition, there are twelve franchised cable systems throughout the island. However, these cable systems are licensed to serve separate communities and, thus, do not overlap in service or provide service throughout the entire island. Moreover, one cable company—Liberty Cablevision of Puerto Rico—operates five of the twelve systems.[42] Thus, despite the fact that there is a high penetration rate of cable television and twelve systems are franchised to offer service, there is less competition or diversity in the provision of cable television in Puerto Rico than these numbers on their face might suggest.

(ii) <u>DBS Service</u>

There is very little available data on the penetration of DBS service in Puerto Rico or the effect of such service on traditional media market sectors or the provision of local news and information. However, Caribbean's research reveals that a limited number of customers subscribe to DBS service, which is provided in Puerto Rico by DirecTV and Echostar.[43]

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[40] *TV & Cable Factbook 2001*, *supra* note 34, at Cable Vol. 2, F3.

[41] This figure is based on the number of cable households passed as a percentage of the number of television households in Puerto Rico. *See CIA World Factbook*, *supra* note 24; *TV & Cable Factbook 2001*, *supra* note 34, at Cable Volume 2, F3.

[42] *TV & Cable Factbook 2001*: *supra* note 34, at Cable Volume 2, D1744-45.

[43] Unofficial information obtained by Caribbean indicates that DirecTV serves approximately 100,000 customers in Puerto Rico (2.5% of the population) and that

(Footnote continued on next page)

(iii) Internet

The Internet penetration level is notably low in Puerto Rico, with approximately 2.8% of the population using the Internet.[44] In contrast, the average penetration rate for sixty-four leading U.S. markets is 43.7%.[45] Considering the economic conditions of Puerto Rico (*i.e.*, 59% of the population lives below the poverty line), the Internet, which requires access to a personal computer and a monthly connection fee, does not serve as a meaningful alternative to the traditional local media.

d. Advertising Market in Puerto Rico

Analysis of the Puerto Rico advertising market reveals that the traditional local media market in Puerto Rico is comprised largely of multiple, independently-owned media outlets with island-wide reaches to attract advertisers.[46] Nonetheless, the Ferré-owned newspapers wield a disproportionately large share of the traditional local media market, as measured by advertising revenue and volume.

(Footnote continued from previous page)
Echostar serves approximately 10,000 customers in Puerto Rico (0.25% of the population).

[44] This figure is based on the number of Internet users as a percentage of the total population in Puerto Rico. *See CIA World Factbook*, *supra* note 24. As of year 2000, Ferré owned the largest Internet network and the most visited websites in Puerto Rico. *See Fierra.com*, Latin Finance, Sept. 1, 2000, *available at* 2000 WL 19732479.

[45] *See* Arbitron, Inc., *Five U.S. Cities Reach 50% Internet Penetration*, *at* http://www.arbitron.com/radio_stations/studies_netpen.htm (last visited Nov. 7, 2001). One recent survey estimates that 72% of all Americans use the Internet. *See* UCLA Ctr. for Communication Policy, *UCLA Internet Report 2001: Surveying the Digital Future, Year Two*, at 17 (Nov. 2001), *available at* http://www.ccp.ucla.edu/pdf/UCLA-Internet-Report-2001.

[46] Given Puerto Rico's demographics, the new media entities do not command an appreciable share of the advertising market. Moreover, these entities provide only a small fraction of local news and local programming, as compared to the traditional media outlets. *See* discussion, *infra*, at Section IV.B.

As discussed above, the two Ferré-owned daily newspapers control 43% of the traditional local media market advertising revenue and 72% of the daily newspaper advertising market sector revenues.[47] A comparison of the advertising volume of Puerto Rico's daily newspapers shows that the two Ferré-owned newspapers commanded approximately 83% of the Spanish-language newspaper advertising volume during the year 2000.[48]

B. <u>Comparable U.S. Mainland Media Markets</u>

A comparison of Puerto Rico to similar-sized local media markets illustrates the unique aspects of Puerto Rico's local media market. Caribbean studied the media markets in Miami-Fort Lauderdale, Florida and Seattle-Tacoma, Washington, two radio Metropolitan Statistical Areas ("MSAs") with comparable Arbitron rankings to Puerto Rico. Caribbean also studied the media markets of Portland, Oregon and Baltimore, Maryland, two television Designated Market Areas ("DMAs") with approximately the same number of television households as Puerto Rico. A summary of each comparable market follows. Attached to these comments is an exhibit depicting this data in chart format.

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[47] *See Investing in Radio 2001*, *supra* note 26; *Investing in Television 2001*, *supra* note 26; Media Fax, Inc., *AdTrac Commercial Monitoring Service*. These percentages represent the traditional media advertising revenue for the year 2000. *See also* note 39, *supra*, and accompanying text.

[48] *See* note 39, *supra*, and accompanying text.

1. **Miami-Fort Lauderdale, Florida**

The population of the Miami-Fort Lauderdale area is 3.8 million.[49] Although similar in population to Puerto Rico, Miami-Fort Lauderdale enjoys a more prosperous economy. Approximately 17.2% of the population lives below the poverty line, compared to about 59% of Puerto Rico's population.[50] Per capita income is $17,269, and average household income is $44,950, almost double the figures for Puerto Rico.[51]

In terms of the traditional media outlets, Miami-Fort Lauderdale has fewer radio stations, television stations, and newspapers. There are two daily newspapers: the Miami Herald and the Fort Lauderdale Sun Sentinel.[52] Twenty-one television stations are licensed to serve 1,468,630 television households.[53] Forty-five radio stations are licensed to twenty-one separate owners.[54] Estimated gross television advertising revenue for 2000 was $485,700,000, and estimated gross radio advertising revenue for 2000 was $265,800,000, for a total of $751,500,000 of estimated gross television and radio advertising dollars.[55] Thus, in radio and television advertising alone, advertisers in Miami-Fort Lauderdale spent more than 2.5 times that of such advertisers in Puerto Rico.

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[49] BIA Research, Inc., *BIAfn's Radio Yearbook* 237 (2001); U.S. Census Bureau, *State & County QuickFacts* ("*State and County QuickFacts*"), *at* http://quickfacts.census.gov/qfd/. Statistics for the Miami-Fort Lauderdale MSA include Broward and Dade Counties.

[50] *Id*.

[51] *Investing in Radio 2001*, *supra* note 26.

[52] *R.R. Bowker's Urlich's Periodicals Directory*, Vol. 5, 10,755 (39th ed., 2001).

[53] *Broadcast & Cable Yearbook, supra* note 34, at Stations Vol. 2, B-207.

[54] *Review of the Radio Industry*, *supra* note 18.

[55] *Investing in Radio*, *supra* note 26; *Investing in Television*, *supra* note 26. Caribbean was unable to locate public information regarding newspaper revenues.

The new media outlets also more deeply penetrate the Miami-Fort Lauderdale market than in Puerto Rico. The Internet penetration rate is 36.9 percent.[56] Three cable systems pass 1,085,100 television households, with cable penetration totaling 74 percent.[57]

2. Seattle-Tacoma, Washington

The population of the Seattle-Tacoma area is 3.55 million people, with approximately 8.5% of the population living below the poverty line.[58] Per capita income is $23,206 – 2.5 times that of Puerto Rico – and average household income is $59,273 – more than double the average household income in Puerto Rico.[59]

The traditional media market sectors in the Seattle-Tacoma market also have fewer radio stations, television stations, and newspapers. There are three daily newspapers: the Seattle Post Intelligencer, the Seattle Times, and the News Tribune.[60] Fifty-two radio stations are licensed to twenty-three separate owners.[61] Twenty-four television stations are licensed to serve 1,605,900 television households.[62] Estimated

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[56] This figure represents the Internet penetration rate as of February 2000. Press Release, Nielsen/Net Ratings, *Nielsen/Net Ratings Reports Internet Penetration and Usage for Top 20 Local Markets* (Apr. 12, 2000), *at* http://www.netratings.com/press/press_ releases/pr_000412.htm.

[57] *TV & Cable Factbook 2001*, *supra* note 34, at Cable Vol. 1, D-251-52; *Broadcasting & Cable Yearbook 2001*, *supra* note 34, at C-4. Miami-Fort Lauderdale ranked thirty-seventh by percentage of cable penetration.

[58] *BIAfn's Radio Yearbook*, *supra* note 49, at 356; *State and County QuickFacts*, *supra* note 49. Statistics for the Seattle-Tacoma MSA include the counties of Island, King, Kitsap, Pierce, Snohomish and Thurston.

[59] *Investing in Radio 2001*, *supra* note 26.

[60] *R.R. Bowker's Urlich's Periodicals Directory*, *supra* note 52, at Vol. 4, 10,827-28.

[61] *Review of the Radio Industry, 2001*, *supra* note 18.

[62] *Broadcasting & Cable Yearbook 2001*, *supra* note 34, at B-228.

gross television advertising revenue for 2000 was $369,300,000, and estimated gross radio advertising revenue for 2000 was $254,300,000, for a total of $623,600,000 of estimated gross television and radio advertising.[63] Thus, in radio and television advertising alone, advertisers in Seattle-Tacoma spent more than two times the amount of advertising dollars as in Puerto Rico.

New media outlets in the Seattle-Tacoma area also have more presence than new media in Puerto Rico. The Internet penetration rate is 69.6%.[64] Also, three cable systems pass 1,168,010 television households, with cable penetration totaling 73 percent.[65]

3. Portland, Oregon

The Portland DMA has a population of 2.7 million and has 1,017,760 television households.[66] Approximately 10.3% of the population in Portland lives below the poverty line, compared to almost 59% in Puerto Rico.[67] Per capita income is $17,802, and average household income is $45,891, almost double the figures for Puerto Rico.[68]

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[63] *Investing in Radio*, *supra* note 26; *Investing in Television*, *supra* note 26. Caribbean was unable to locate public information regarding newspaper revenues.

[64] This figure represents the Internet penetration rate as of March 2001. Press Release, Nielsen/Net Ratings, *West Coast Cities Hit 70 Percent Internet Penetration* (Apr. 3, 2001), *at* http://www.nielsen-netratings.com/pr/pr-010403.pdf.

[65] *TV & Cable Factbook 2001*, *supra* note 34, at Cable Vol. 2, D-1648-49, D-1651; *Broadcasting & Cable Yearbook 2001*, *supra* note 34, at C-5. Seattle-Tacoma ranked forty-seventh by percentage of cable penetration.

[66] *Investing in Television 2001*, *supra* note 26; *State and County QuickFacts*, *supra* note 49. Statistics for the Portland, Oregon DMA include the Oregon counties of Baker, Clackamas, Clastop, Columbia, Crook, Gilliam, Harney, Hood River, Jefferson, Lincoln, Linn, Marion, Multnomah, Polk, Sherman, Tillamook, Union, Wasco, Washington, Wheeler and Yamhill, as well as the Washington counties of Clark, Cowlitz, Klickitat, Skamania and Wahkiskum.

[67] *Id*.

[68] *Investing in Television 2001*, *supra* note 26.

Like other U.S. mainland markets, the traditional media market sectors in Portland have more advertising income to disperse among fewer media outlets. Sixteen television stations are licensed in the Portland DMA.[69] Forty-three radio stations are licensed to twenty-two separate owners.[70] Estimated gross television advertising revenue for 2000 was $195,400,000, and estimated gross radio advertising revenue for 2000 was $128,200,000, for a total of $323,600,000 of estimated gross television and radio advertising income.[71] Although radio and television advertising revenue in Portland is less than that of Seattle-Tacoma and Miami-Fort Lauderdale, it is still greater than such revenue for Puerto Rico. The Oregonian is the sole daily newspaper in Portland.[72]

In terms of new media, Portland has relatively high Internet and cable penetration rates. The Internet penetration rate is 69.7%.[73] In addition, the cable penetration rate is 62%, with two cable systems passing 635,860 television households.[74]

4. <u>Baltimore, Maryland</u>

The population of the Baltimore DMA is 2.7 million people.[75] Baltimore has 1,010,160 television households.[76] Approximately 10.7% of the Baltimore population

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[69] *Broadcasting & Cable Yearbook 2001*, *supra* note 34, at B-219.

[70] *Review of the Radio Industry, 2001*, *supra* note 18.

[71] *Investing in Radio*, *supra* note 26; *Investing in Television*, *supra* note 26. Caribbean was unable to locate public information regarding newspaper revenues.

[72] *R.R. Bowker's Urlich's Periodicals Directory*, *supra* 52, at Vol. 4, 10,809.

[73] This figure represents the Internet penetration rate as of March 2001. *West Coast Cities Hit 70 Percent Internet Penetration*, *supra* note 64.

[74] *TV & Cable Factbook 2001*, *supra* note 34, at Cable Vol. 2, D-1298-99; *Broadcasting & Cable Yearbook 2001*, *supra* note 34, at C-4.

[75] *State and County QuickFacts*, *supra* note 49. Statistics for the Baltimore DMA include the counties of Anne Arundel, Baltimore, Baltimore City, Caroline, Carroll, Cecil, Dorchester, Harford, Howard, Kent, Queen Adams, and Talbot.

[76] *Investing in Television 2001*, *supra* note 26.

live below the poverty line.[77] Per capita income is $18,965, and average household income is $50,595, more than double the figures for Puerto Rico.[78]

The traditional media market sectors in Baltimore also have fewer media outlets and more advertising revenue. Twelve television stations are licensed in Baltimore.[79] Thirty-one radio stations are licensed to seventeen separate owners.[80] Estimated gross television advertising revenue for 2000 was $231,000,000, and estimated gross radio advertising revenue for 2000 was $134,500,000, for a total of $365,500,000 of estimated gross television and radio advertising.[81] The Baltimore Sun is the only daily newspaper in the Baltimore area.[82]

New media outlets in Baltimore are more prevalent than in Puerto Rico. The Internet penetration rate is 57%.[83] In addition, the cable penetration rate is 68%, with two cable systems passing 698,990 television households.[84]

5. <u>Conclusions Regarding Market Comparisons</u>

In sum, a comparison of similarly sized media markets to Puerto Rico reveals that Puerto Rico has far lower per capita income and average household income and a

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[77] *State and County QuickFacts*, *supra* note 49; *Investing in Television 2001, supra* note 26.

[78] *Investing in Television 2001, supra* note 26.

[79] *Broadcasting & Cable Yearbook*, *supra* note 34, at B-165.

[80] *Review of the Radio Industry, 2001*, *supra* note 18.

[81] *Investing in Radio*, *supra* note 26; *Investing in Television*, *supra* note 26. Caribbean was unable to locate public information regarding newspaper revenues.

[82] *R.R. Bowker's Urlich's Periodicals Directory*, *supra* note 52, at Vol. 4, 10777.

[83] This figure represents the Internet penetration rate as of March 2001. *West Coast Cities Hit 70 Percent Internet Penetration*, *supra* note 64.

[84] *TV & Cable Factbook 2001*, *supra* note 34, at Cable Vol. 1, D-698; *Broadcasting & Cable Yearbook 2001*, *supra* note 34, at C-2.

disproportionate percentage of citizens living below the poverty line. Thus, Puerto Ricans have less disposable income, and advertisers compete within a small pool of consumer spending power.

As a result of the economic conditions in Puerto Rico, the island's traditional media outlets derive comparatively low total revenue from advertising. At the same time, this low total advertising revenue is divided among a relatively large number of discrete media outlets, causing a very high degree of market fragmentation. Furthermore, one media entity in Puerto Rico controls two daily newspapers, garnering a combined advertising market share in the newspaper market sector of 72% and, in terms of overall advertising dollars in the traditional media, a combined advertising market share of 43%. As discussed below, Caribbean thus urges the Commission to revise the newspaper/broadcast cross-ownership rule to protect diversity and competition in geographic markets, such as Puerto Rico, where one entity controls approximately 70% or more of advertising in a media market sector.

IV. THE COMMISSION SHOULD PROMULGATE A NEW CROSS-OWNERSHIP ANALYSIS DESIGNED TO PROTECT DIVERSITY OF OWNERSHIP AND VIEWPOINTS WHERE ONE MEDIA OUTLET OWNER CONTROLS A LOCAL MEDIA MARKET SECTOR, AS MEASURED BY ADVERTISING SHARE

A. The Commission Should Clarify that the Rule's Definition of "Daily Newspaper" Applies to Spanish-Language Newspapers in Puerto Rico.

As an initial matter, Caribbean seeks confirmation that the newspaper/broadcast cross-ownership rule—in its current version—applies to Spanish-language daily newspapers in Puerto Rico.[85]

The present version of the newspaper/broadcast cross-ownership rule—as discussed above—unconditionally prohibits common ownership of a "daily newspaper" and a broadcast station within the same community.[86] Note 6 to Section 73.3555 defines a "daily newspaper" as "one which is published four or more days per week, which is in the English language and which is circulated generally in the community of publication."[87]

1. The Commission Expressly Intended to Apply the Cross-Ownership Rule to Puerto Rico.

As discussed in greater detail above, the Commission adopted the cross-ownership prohibition to promote diversity of programming and competition in the local media markets.[88] At the time of the rule's inception, the Commission rejected requests to exempt Puerto Rico from the rule, recognizing that the goals underlying the rule were of

[85] Spanish-language daily newspapers in Puerto Rico should continue to be considered daily newspapers for purposes of any revised rule.

[86] 47 C.F.R. § 73.3555(d).

[87] *Id*. at n.6. *See NPRM* ¶ 2 n.4 (providing definition).

[88] *See generally Cross-Ownership Second Report and Order, supra* note 4.

equal concern in Puerto Rico as in the mainland United States.[89] The Commission stated that "[i]n our view, the need for diversity is no less great in Puerto Rico than elsewhere, and we see no less need to apply the prospective rules there."[90] Thus, from the newspaper/broadcast cross-ownership rule's inception, the Commission clearly intended that the rule apply to the radio outlets, television outlets, and newspapers in Puerto Rico.

Moreover, the *Cross-Ownership Second Report and Order* makes clear that the Commission intended to exclude "foreign language dailies," which are "specialized publications" rather than publications of general circulation, from the prohibition on common ownership.[91] However, Note 6 codifies the intent to exclude foreign language newspapers by stating only that "English language" daily newspapers fall within the scope of the rule. This "short-hand" definition of a daily newspaper fulfills the Commission's original intention in most U.S. markets where English is the primary language. However, the literal—and perhaps inartfully drafted—words in Note 6 do not fulfill the Commission's stated intention to apply the cross-ownership ban in Puerto Rico, where Spanish is an official language and the language that predominates the media market and society. In fact, in Puerto Rico, a Spanish-language daily newspaper is not a

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[89] *Id.* ¶ 123.

[90] *Id.* (rejecting a proposal to exempt Puerto Rico from the newspaper/broadcast cross-ownership rules).

[91] *Id.* ¶ 101 ("[W]e do not believe that weekly newspapers or specialized publications (including foreign language dailies) need to be included in the prohibitions we are adopting."). *See* Letter from Edythe Wise, Chief, Complaints & Investigation Branch, Enforcement Div., Mass Media Bureau, to Larry Ellis Read, 8 FCC Rcd. 4222 (1993) (quoting *Cross-Ownership Second Report and Order*).

"foreign language" newspaper and therefore does not fall outside the Commission's intended scope of the cross-ownership prohibition.[92]

Furthermore, the Commission previously has considered Spanish-language media in assessing whether its cross-ownership goals of diversity and competition are being satisfied in the Puerto Rico media market.[93] In connection with the request for a waiver of the one-to-a-market rule, the Commission did not hold—or even intimate—that Section 73.3555 did not apply because the media in Puerto Rico were predominantly Spanish-language. Rather, in listing the number of "voices" in Puerto Rico, the Commission stated in its *Pegasus* Order that Puerto Rico was served by three daily newspapers[94]—El Nuevo Día, El Vocero, and the San Juan Star—two of which are Spanish-language newspapers. The Commission made no distinction regarding the newspapers' languages and analyzed the waiver request without regard to whether the media involved were English-language or Spanish-language. Although the *Pegasus* Order involved ownership of two broadcast interests in the same market rather than the newspaper/broadcast cross-ownership ban, *Pegasus* nonetheless confirms that the Commission's goals of diversity and competition are only achieved in Puerto Rico by counting Spanish-language media in the Puerto Rico market.

[92] Caribbean does not propose that the cross-ownership ban be modified to assess on a community-by-community basis the definition of "daily newspaper" based on the predominant language of a given community. Rather, Caribbean merely requests that the Commission pronounce the narrow confirmation that the cross-ownership ban applies to Spanish-language newspapers in Puerto Rico, given its unique language and cultural circumstances and the Commission's original and unambiguous intent to apply the rule to Puerto Rico.

[93] *See In re Application of Pegasus Broad., LLC and Chancellor Media Corp. of Los Angeles*, Memorandum Opinion and Order, 14 FCC Rcd. 13,767 (1999) ("*Pegasus*").

[94] *Id*. ¶ 18.

A literal reading of Note 6—as applied to Puerto Rico—would thwart the Commission's goals of competition and diversity. As detailed fully above in Section III.A.3.a, the fact that the Spanish language predominates Puerto Rican society, government, and media, a literal reading of Note 6 would produce an unintended result.

2. The Cross-Ownership Rule Would Be Rendered Meaningless if its Definition of Daily Newspaper Excluded Spanish-Language Newspapers.

In today's Puerto Rico media market, cross-ownership by Ferré of its two newspapers plus broadcast outlets would likely further concentrate the overall media advertising market, in which Ferré-owned daily newspapers objectively control the newspaper advertising market sector.[95] As discussed below in detail, the owner of the largest daily newspapers in Puerto Rico could leverage its control of the newspaper advertising market sector into the broadcast advertising market sector and gain an ever-increasing share of the overall pool of advertising revenues in the Puerto Rico media market. Such a result would completely undermine one of the Commission's primary public interest objectives—to promote competition in local media markets.

Moreover, if the rule did not prohibit the owner of a Spanish-language daily newspaper in Puerto Rico from acquiring broadcast stations in the same community, the resulting common ownership would diminish the number of media voices providing diverse public news and information in Spanish—the language that most broadly serves the Puerto Rico community. Applying any cross-ownership rule only to English-

[95] *See supra* Section III.

language newspapers in Puerto Rico therefore would also impede delivery of diverse news and information to local consumers.

A well-established maxim of statutory construction, which also is applicable to regulatory interpretation,[96] provides that interpretation must go beyond the literal meaning of a regulation if a literal interpretation would defeat the underlying purpose of the regulation.[97] Moreover, interpretation of a regulation must look beyond the literal meaning if it would lead to an absurd result.[98]

In this case, the Commission's public interest goals of diversity and competition may only be achieved in the Puerto Rico media market by interpreting Section 73.3555(d) beyond its literal reading to apply the prohibition to Spanish-language daily newspapers. Any other interpretation of Section 73.3555(d) would violate the spirit of the regulation and produce an unintended and absurd result. Therefore, in order to promote the Commission's dual goals of diversity and competition within the Puerto Rico media market, the Commission should explicitly affirm that the rule—if retained in its current form or modified in any way short of total elimination—continues to apply to Spanish-language daily newspapers in Puerto Rico.

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[96] Rules applicable to statutory construction are also appropriate tools for the interpretation of agency regulations. *Berkley* v. *United States*, 48 Fed. Cl. 361, 371 (2000); *First Nat'l Bank of Chicago* v. *Standard Bank & Trust*, 172 F.3d 472, 476 (7th Cir. 1999).

[97] *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 586 (1983).

[98] *Chowdhury* v. *Ashcroft*, 241 F.3d 848, 853 (7th Cir. 2001); *Santamaria-Ames* v. *INS*, 104 F.3d 1127, 1130 (9th Cir. 1996).

B. Puerto Rico's Advertising Market Would Lack Sufficient Competition if the Rule Were Abolished.

The Commission seeks information about the *economic effect* of maintaining or modifying the newspaper/broadcast cross-ownership rule. Caribbean contends that the Commission should continue to focus on the primary *economic market* in which broadcast stations and newspapers compete: *advertising*.[99]

As an initial matter, Caribbean recognizes that the U.S. Department of Justice and federal courts view the local radio, television, and newspaper advertising markets as *distinct* advertising markets.[100] This is a logical conclusion because an increase in price by a dominant firm or firms in any one market sector is unlikely to be defeated by

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[99] In discussing the role of advertising in the television market sector, for example, the Commission explained that advertisers are the "agents" of consumers in deciding what programs broadcasters supply to consumers. Vigorous competition for advertising dollars "is likely to benefit consumers by making available television programming that meets the programming preferences of consumers." *In re Amendment of Section 73.658(G) of the Commission's Rules—The Dual Network Rule*, Report and Order, 16 FCC Rcd. 11,114 at n.44 (2001). As one scholar stated, "advertiser demand for space in the print media and time in the broadcast media is a derived demand stemming from a demand for audience, and is a positive function of the size and quality of audience." James M. Ferguson, *Daily Newspaper Advertising Rates, Local Media Cross-Ownership, Newspaper Chains, and Media Competition*, 26 J.L. & Econ. 635 (1983), cited in *NPRM* at n.69.

[100] *See NPRM* ¶ 21; Joel Klein, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, *DOJ Analysis of Radio Mergers*, Address at ANA Hotel (Feb. 19, 1997), *at* http://www.usdoj.gov/atr/public/speeches/jik97219.htm (stating that radio stations form a distinct local advertising market because most radio advertisers cannot use newspaper, television, cable, or some other medium as an effective advertising substitute); *Cmty. Publishers, Inc.* v. *Donrey Corp.*, 892 F. Supp. 1146 (W.D. Ark. 1995) (finding that local daily newspapers constitute a separate product market from other media), *aff'd sub nom. Cmty. Publishers, Inc.* v. *DR Partners*, 139 F.3d 1180 (8th Cir. 1998); Robert Ekelund, *et al.*, *Is Advertising a Distinct Local Market? An Empirical Analysis*, 14 Rev. Indust. Org. 239 (1999) (concluding that radio advertising is a distinct antitrust market). Caribbean notes, however, that in 1975, the Department of Justice asserted that newspapers and television stations were in many ways engaged in the *same* business, "namely attracting audiences and selling them to advertisers." *Cross-Ownership Second Report and Order*, *supra* note 4, ¶ 35.

advertisers switching to an entirely different medium.[101] Viewed in this manner, antitrust laws likely would not conclude that the merger of a newspaper and a broadcast outlet is a horizontal merger.[102] Instead, antitrust laws would treat such a combination as a conglomerate merger.[103] This type of merger therefore would be difficult to challenge under current antitrust enforcement theories.

However, the Commission's analysis of exceptional local media markets—such as Puerto Rico—demands a different result.[104] Here, instead, the Commission should recognize that viewpoint *diversity* may be objectively preserved only through avoiding further concentration in an already competitively imbalanced local media market.[105] This distinct competitive analysis, a key component of the public interest standard, provides a

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[101] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* §§ 1.11-1.12 (1992 and rev. 1997) ("*Horizontal Merger Guidelines*"), *at* http://www.usdoj.gov/atr/public/guidelines/ horiz_book/11.html (discussing price discrimination and product market definition). The Commission also has focused its regulations and merger investigations on market shares within narrowly defined market sectors. *See generally* David Waterman, *CBS-Viacom and the Effects of Media Mergers: An Economic Perspective*, 52 Fed. Comm. L.J. 531, § 2 (2000) (discussing this focus).

[102] As the Commission has stated, "*[h]orizontal market share* or concentration and barriers to entry are key factors in determining whether market power exists." *In re Revision of Radio Rules and Policies*, Second Memorandum Opinion and Order, 9 FCC Rcd. 7,183 ¶ 10 (1994) (emphasis added) (citing *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966)).

[103] *See, e.g., FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 577 n.2 (1967) ("A pure conglomerate merger is one in which there are no economic relationships between the acquiring and the acquired firm."); Conrad Shumadine *et al.*, *Antitrust & The Media*, 627 PLI/Pat 7, 344 (Nov. 2000) ("A conglomerate merger involves the consolidation of firms that are neither direct competitors nor vertically linked.").

[104] In specific circumstances where certain considerations are of "overriding importance," the Commission may not be strictly bound by the dictates of antitrust law. *See Cross-Ownership Second Report and Order*, *supra* note 4, ¶ 110.

[105] See generally the Commission's discussion in the *Cross-Ownership Second Report and Order*, *supra* note 4, ¶ 110, where it "analyzed the basic media ownership questions in terms of [the Commission's] primary concern—diversity in ownership as a means of enhancing diversity in programming service to the public—rather than in terms of a strictly antitrust approach."

transparent and practical mechanism to determine whether adequate diversity exists in a given market to permit newspaper/broadcast cross-ownership. Thus, recognition of the causality between concentration of control in media advertising and preserving sufficient levels of diversity lends clarity to a concept that has long been viewed as somewhat amorphous.[106]

In any local media market, there is a finite amount of money that entities budget for media advertising. For many of these entities, radio, television, and print advertising are not substitutable.[107] Some entities may find that print advertising alone is the most effective use of their media advertising budget, while other entities may find that a mix of different media advertising is the most effective strategy. This, however, does not diminish the fact that the limited pool of available advertising revenues in a market is a critical competitive factor for all local media entities. In a broad sense, these entities "compete" with one another, as they each desire a greater share of finite advertising revenues.[108]

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[106] As the Commission has stated, a focus on viewpoint diversity examines the number of voices available to the people of a given area. This approach recognizes "that it is unrealistic to expect true diversity from a commonly owned station-newspaper combination." *Cross-Ownership Second Report and Order*, *supra* note 4, ¶ 111.

[107] In explaining this concept, the Commission stated that "the 'products' involved in competition analysis of broadcast media are the listening or viewing audiences, which are in effect sold by radio and television stations to advertisers. The relevant product market is thus measured by the *substitutability* of different media (*i.e.*, radio, television, cable, and newspapers) for the purposes of purchasing advertising." *In re Amendment of Section 73.3555 of the Commission's Rules—The Broad. Ownership Rules*, First Report and Order, 4 FCC Rcd. 1,723 at n.42 (1988) (citation omitted) (emphasis added). *See Biennial Regulatory Review Report*, *supra* note 9, ¶ 55 (discussing the limitations of substitutability).

[108] On prior occasions, the Commission has measured the respective shares of competing media market sectors by determining the percentage of revenue derived from overall media advertising. In such contexts, it has asked whether diversity would be affected if a single entity garnered excessive market share as measured by overall media market

(Footnote continued on next page)

Within this finite pool of advertising dollars, revenues from the newspaper market sector comprise on average as much as 59% of local media advertising revenues.[109] While local merchants may use a variety of media for advertising their products or services, they choose to place advertisements in newspapers with three times as much frequency than with radio or television outlets. Thus, the test proposed by Caribbean recognizes that advertisers may choose to advertise through a mixture of media outlets, but that daily newspaper advertising retains a unique effectiveness in local advertising markets, justifying continued examination of newspaper/television and newspaper/radio combinations.

Although many media markets, such as the Puerto Rico market, have seen the introduction of "new" media in recent years, new media outlets are *not* yet substitutes for broadcast stations or newspapers on the local level for diversity or competition purposes. First, new media are not available to consumers in Puerto Rico to the same extent as

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(Footnote continued from previous page)
advertising. *See, e.g., In re Matter of Newspaper/Radio Cross-Ownership Waiver Policy*, Notice of Inquiry, 11 FCC Rcd. 13,003 ¶ 20 (1996).

[109] One study predicts that for 2001, local advertising share for newspapers will represent 59% of traditional media market sector advertising revenues, with the shares for television and radio equaling 19% and 22% respectively. Lee Barney, *The Truth in Advertising (Spending)*, TheStreet.com, June 18, 2001, *at* http://www.thestreet.com/funds/dailyinterview/1463388.html. In another study comparing local advertising shares among newspapers, radio, television, and outdoor advertising, newspapers enjoyed a 43% market share, compared to 27% for radio and 23% for television. Ann Maxwell & Wayne Wanta, *Advertising Agencies Reduce Reliance on Newspaper Ads*, 22 Newspaper Research Council 2, *available at* 2001 WL 26881245 (Apr. 1, 2001) (discussing newspapers' historical dominance of media market advertising). Many advertisers rely heavily on print advertising because print advertisements require consumer/reader's active involvement and attention. *See, e.g., IAB Advertising Effectiveness Study*, Interactive Advertising Bureau, *at* http://www. iab.net/advertise/content/adeff3.html. Newspapers are viewed as an effective medium for both "informational" and "notice" advertising, whereas radio, for example, is suitable only for notice advertising. John E. Lopatka & Andrew N. Kleit, *The Mystery of Lorain Journal & The Quest for Foreclosure in Antitrust*, 73 Tex. L. Rev. 1255, 1288 (May 1995).

broadcast services and newspapers due to the high poverty rate in Puerto Rico. Thus, the new media are not substitutes for *advertisers*. Moreover, most new media outlets do not serve as distinct voices for locally-originated programming or local news.[110] By contrast, broadcasters must fulfill their public interest obligations by airing programming that is responsive to local issues, and daily newspapers also routinely cover vital local issues. The traditional media outlets, unlike the new media outlets, therefore are directly responsible for meeting the goal of providing diverse views on local issues.

Forty-three percent of Puerto Rico's total traditional media advertising revenues are concentrated in a single entity. This fact, coupled with the market fragmentation, places other Puerto Rico media outlets in precarious competitive situations. The many other smaller media market outlets must be able to retain their cumulative 57% market share to maintain commercial viability. No other media outlet owner in the Puerto Rico market wields enough market share to counterbalance Ferré's share. If Ferré were permitted to acquire broadcast stations in the Puerto Rico media market, Ferré unquestionably would possess the power to *raise* advertising rates.[111] Alternately, Ferré could engage in predatory pricing by artificially *lowering* advertising rates and recouping

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[110] For example, in the United States, many of the news and information sites on the Internet are operated by local newspaper and television stations. Additionally, in 1999, six of the top ten and twenty of the top thirty most frequently visited Internet sites were linked to broadcast licensees. Larry Irving, Ass't Sec'y for Communications & Info., NTIA, U.S. Dep't of Commerce, *The Impact of Convergence in the Media*, Address delivered at the Conference on Broadcast, Cable, and Media Industry Unions Dep't for Prof'l Employees, AFL-CIO, Las Vegas, Nev. (Apr. 19, 1999).

[111] "[H]orizontal concentration can give firms sufficient market power to raise rates above competitive levels or otherwise engage in anticompetitive activity." *1998 Notice of Inquiry*, *supra* note 7, ¶ 12. *See* Conrad M. Shumadine, *supra* note 103, at 144 (stating that because "advertisers will spend only a fixed sum on newspaper advertising, calculated rate increases by the dominant newspaper may deprive the non-dominant publications of advertising revenue.").

losses through volume sales, to the detriment of media outlets that are not positioned to offer packages of broadcast and newspaper advertising.[112] Ferré's dominance of the overall local media market in Puerto Rico would give it the power to diminish competition in advertising and to threaten the viability of other newspapers and broadcast outlets that offer competing news and local information.[113]

The Commission also has asked commenters to offer analysis regarding any of the approximately fifty grandfathered newspaper/broadcast combinations.[114] Caribbean's selective research of these combinations demonstrates that in markets where there are newspaper/broadcast combinations, multimedia advertising packages are aggressively marketed. For example, the Tribune Company ("Tribune") is a grandfathered firm that owns both newspapers and radio stations, as well as newspapers and television stations,

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[112] Because competitive battles in the media are often waged within industry sectors, cross-media ownership can significantly skew such competition in a local media market where packages of television, radio, or newspaper advertising are offered by one firm. *See* David Waterman, *supra* note 101, § II. The offering of such packages, especially at "predatory" rates, could drive rivals out of a market sector. *See* Conrad M. Shumadine, *supra* note 103, at 112 (stating that predatory pricing involves setting advertising rates at levels below cost for the purpose of destroying or disciplining a competitor).

[113] Current trends in Puerto Rico newspaper readership already reveal an increase in the strength of Ferré's newspapers as compared to competitors. From 1998 to 2000, the number of daily newspaper *readers* changed in the following respects:

- El Nuevo Día—an *increase* from 1,273,000 readers to 1,582,000 readers;
- Primera Hora—an *increase* from 349,000 readers to 665,000 readers;
- El Vocero—a *decrease* from 1,001,000 readers to 969,000 readers; and
- San Juan Star—a *decrease* from 107,000 readers to 76,000 readers.

See Study of Newspaper Readership in Puerto Rico, *supra* note 32, at 8. This trend is especially significant in light of the contrasting readership profiles of Puerto Rico's daily newspapers. As compared to readers of the Ferré-owned newspapers, El Vocero readers are statistically less *educated* and earn less *income*, *id.* at 13, a fact that makes El Vocero less attractive to advertisers than the Ferré-owned newspapers. Were Ferré permitted to cross-own broadcast stations, merchants would be even more likely to advertise in Ferré media outlets.

[114] *NPRM* ¶ 28.

in the same local markets. Tribune states that it is the second largest newspaper publisher and fourth largest television group in the United States.[115] Tribune recently advocated its use of cross-media assets to cross-promote its media outlets:

> As an example, in New York, WPIX[-TV] does not have a large budget for newspaper advertising. But, using our successful Chicago model, now that Newsday is part of the family, ads promoting WPIX programming frequently appear in the paper. This enables WPIX to reach the upscale demos of Nassau and Suffolk counties at no cash cost. But the cross-promotion works the other way as well—Newsday stories and reporters are prominently mentioned during WPIX newscasts. We are seeing similar successes in Los Angeles and Hartford as well.[116]

In highlighting its media strategy, Tribune described giving advertisers "a one-stop shop by delivering a range of local outlets such as television, radio, newspapers, cable channels and Internet sites in the same city."[117]

Additionally, WEEU Broadcasting Company cross-owns the Reading Times & Eagle and WEEU-AM in Reading, Pennsylvania. The promotional materials for WEEU-AM specifically offer "multi-media" advertising packages. Such materials state that "[w]e specialize in mixed media promotions utilizing the power of radio, print, television, outdoor, and Internet."[118]

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[115] Tribune Co. Presentation at Salomon Smith Barney Global Entm't, Media and Telecommunications Conference, Scottsdale, Arizona (Jan. 9, 2001), *at* http://www.tribune.com/about/news/2001/ssbscript.htm (last visited Nov. 15, 2001).

[116] *Id.*

[117] Sallie Hofmeister & Stuart Silverstein, *Tribune-Times Mirror Merger*, Los Angeles Times, Mar. 14, 2000, at A10.

[118] Promotional materials, WEEU Media Kit, *at* http://www.weeu.com/mediakit.asp (last visited Nov. 23, 2001).

Finally, The New York Times Company cross-owns the New York Times daily newspaper and WQXR-FM in the New York City market. The promotional materials for WQXR-FM state the following:

> The station is owned by the New York Times Company, and its association with the country's greatest newspaper gives it a unique niche in American broadcasting. … WQXR's distinctive format and programming, combined with loyal and responsive listeners, creates a medium that maximizes advertising and marketing dollars. … [A]dvertisers get the added bonus of being associated with a prestigious news organization.[119]

Thus, it is highly likely that if Ferré—with its 43% share of the overall traditional media market—gains entry into the broadcast market sectors, Ferré will follow the lead of grandfathered combinations by commencing multimedia marketing and selling broadcast and print advertising.[120] Ferré's media outlets will become even more attractive to advertisers, who will increase their advertisements in those outlets. That will rapidly erode the remaining 57% market share of the other media outlets in Puerto Rico.

With respect to local media markets like Puerto Rico, the Commission should recognize that diversity may be objectively preserved through avoiding further concentration in an already competitively imbalanced local media market. In Puerto

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[119] Promotional materials, *at* http://www.wqxr.com (last visited Nov. 23, 2001) and promotional materials faxed to Caribbean's counsel on November 8, 2001.

[120] A combination advertising rate between a newspaper and a broadcast outlet may constitute an unlawful transference of monopoly power if the newspaper or broadcaster enjoys monopoly power in one market and that power makes the rate charged in the second market especially attractive to advertisers. *See* Conrad M. Shumadine, *supra* note 103, at 151.

Ferré already has exhibited an interest in pursuing general cross-marketing business strategies. For example, Ferré owns the second largest commercial printing press in Puerto Rico, which produces pre-printed advertising inserts and supplements for interested merchants. Ferré offers special rate packages and discounts to merchants that decide to hire Ferré's printing press and to place direct advertisements in Ferré's two newspapers.

Rico, there is no better measure of the state of economic competition than the traditional media advertising market. As the Commission has recognized, competition is likely to be greater in markets where many *separate* firms vie to serve customers than in markets where few firms serve the market.[121] Further concentration would diminish the diversity of news and public affairs programming and reduce the overall vibrancy of the Puerto Rico media market.

V. THE COMMISSION SHOULD ALLOW AN ENTITY TO JOINTLY OWN OR CONTROL A DAILY NEWSPAPER AND A BROADCAST STATION ONLY IF THAT ENTITY DOES NOT POSSESS AN APPROXIMATELY SEVENTY PERCENT OR GREATER SHARE OF AN EXISTING MEDIA MARKET SECTOR

Caribbean proposes that the Commission modify the current cross-ownership rule to allow an entity to jointly own or control a daily newspaper and broadcast outlet only if that entity does not possess an approximately 70% or greater share of advertising revenues in a media market sector.

As an initial matter, Caribbean acknowledges that in most situations, the joint operation of a daily newspaper and broadcast station may create economies of scale and scope. For example, consolidation of news operations and a sharing of news-reporting expertise could yield cost efficiencies and could enhance the quality of news programming.[122] Additionally, consolidated operations may achieve economies of size in

[121] *See, e.g., Review of the Commission's Regulations Governing Television Broad.*, Report and Order, 14 FCC Rcd. 12,903 ¶ 26 (1999) (citing Joseph E. Stiglitz, *Economics* 346 (2d ed. 1997)), *on recon.*, 14 FCC Rcd. 20,571 (1999).

[122] *See generally DOJ Analysis of Radio Mergers*, *supra* note 100 (discussing effects of staff consolidation as a result of radio station mergers).

financing and in management. Some synergies may even provide cost savings that flow to advertisers and then to consumers.

Caribbean also concedes that most media markets in the United States contain so many independent and relatively equal sized competitors—in newspapers, television, radio, and new media—that a combination of a newspaper and broadcast outlet would be unlikely to have anticompetitive, anticonsumer, or antidiversity effects. In such markets, there is little danger that common ownership or control of media outlets would lead to an abuse of market power that would create bottleneck monopolies or significantly reduce antagonistic viewpoints. In such instances, Caribbean does not support a cross-ownership rule that might unduly constrain the business competitiveness and viability of broadcast or newspaper outlets.

There are many other geographic markets, however, where a single daily newspaper, or commonly-owned or commonly-controlled daily newspapers, is dominant. As noted previously, in Puerto Rico, Ferré fits that description. Through its ownership and control of two of Puerto Rico's largest daily newspapers, Ferré enjoys 83% of the volume in Spanish-language newspaper advertising, 72% of daily newspaper advertising revenues, and 43% of overall traditional media market advertising revenues. In these circumstances, further increases of market power by the dominant firm, and the opportunity for that firm to leverage its advertising services into other media market sectors, could have a devastating effect on smaller newspapers that barely are surviving against Ferré.[123]

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[123] The Department of Justice and the Federal Trade Commission have recognized that "[e]ven when efficiencies generated through merger enhance a firm's ability to compete

(Footnote continued on next page)

Antitrust law supports the theory that a firm that controls at least 70% of a market sector approaches monopoly power.[124] The Commission should employ this antitrust principle as a key component in refashioning the cross-ownership rule. Setting the threshold at approximately 70% is critical to an accurate and circumspect competitive analysis in determining whether cross-owned newspaper and broadcast outlets benefit the public interest.

As stated earlier, given past precedent, an acquisition by a daily newspaper of one or more broadcast outlets would be treated as a conglomerate merger under the antitrust laws and would be difficult to challenge under current antitrust theories of enforcement.[125] Only the Commission's newspaper/broadcast cross-ownership rule—

(Footnote continued from previous page)
… a merger may have other effects that may lessen competition and ultimately may make the merger anticompetitive. *Horizontal Merger Guidelines*, *supra* note 101, § 4.

[124] *See, e.g.*, United *States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956) (determining that control of 75% of a relevant market constituted monopoly power); *MCI Communications Corp.* v. *AT&T*, 708 F.2d 1081, 1107 (7th Cir.) ("Where … data reveals a market share of more than seventy to eighty percent, the courts have inferred the existence of monopoly power."), *cert. denied*, 464 U.S. 891 (1983); *Broadway Delivery Corp.* v. *United Parcel Svc. of Am.*, 651 F.2d 122, 129 (2d Cir.) (suggesting that jury could be instructed that a market share above 70% is usually strong evidence of monopoly power."), *cert. denied*, 454 U.S. 968 (1981); *Heatransfer Corp.* v. *Volkswagenwerk, A.G.*, 553 F.2d 964, 981 (5th Cir. 1977) (stating that control of 71% to 76% of a relevant market constitutes monopoly power), *cert. denied*, 434 U.S. 1087 (1978). The Commission has cited with approval sources stating that market share below 50% is insufficient to evidence market power and that the greatest uncertainty exists when market share is between 50% and 70%. *See In re Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd. 23,891, n.314 (1997).

[125] Again, under antitrust review, a conglomerate merger (or product extension merger) generally is viewed as posing no anticompetitive threat because it is a combination of two companies who do not compete and who are not in a buyer-seller relationship. Of the various types of mergers, conglomerate mergers are "the least likely to pose antitrust problems." H. Peter Nesvold, Note, *Communication Breakdown: Developing an Antitrust Model for Multimedia Mergers & Acquisitions*, 6 Fordham Intell. Prop. Media & Ent. L.J. 781, 798 (Spring 1996).

tailored to address, for example, situations where a single newspaper or a pair of newspapers has a market sector share approaching 70%—can prevent further aggregations of market power, elimination of smaller competitors, and preservation of diversity of viewpoints.

VI. CONCLUSION

For the reasons set forth above in these comments, Caribbean urges the Commission to take the following actions in this rulemaking proceeding: (1) confirm that the newspaper/broadcast cross-ownership rule's definition of "daily newspaper" encompasses Spanish-language newspapers in Puerto Rico, and (2) promulgate a new cross-ownership rule that would allow an entity to jointly own or control a daily newspaper and broadcast station only if that entity does not possess above an approximate 70% share of the existing advertising market in a media market sector.

Respectfully submitted,

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Comparison of the Puerto Rico Media Market With Other Local Media Markets

Newspaper/Broadcast Cross-Ownership Rule Making Proceeding

	Puerto Rico	Seattle-Tacoma	Miami-Fort Lauderdale	Portland	Baltimore
Population	3.9 million	3.55 million	3.8 million	2.7 million	2.7 million
Percentage Below the Poverty Line	58.9%	8.5%	17.2%	10.3%	10.7%
Per Capita Income	$8,914	$23,206	$17,269	$17,802	$18,965
Average Household Income	$25,425	$59,273	$44,950	$45,891	$50,595
TV Advertising Revenues	$114,900,000	$369,300,000	$485,700,000	$195,400,000	$231,000,000/
Radio Advertising Revenues	$172,000,000	$254,300,000	$265,800,000	$128,200,000	$134,500,000
Radio Stations	89	52	45	43	31
Radio Owners	56	23	21	22	17
TV Stations	31	24	21	16	12
TV Households	1,021,000	1,605,900	1,468,630	1,017,760	1,010,160
Daily Newspapers	4	3	2	1	1
Internet Penetration	2.8%	69.6%	36.9%	69.7%	57%
Cable Systems	12	3	3	2	2
Cable Penetration	76%	73%	74%	62%	68%
Cable Households Passed	772,062	1,168,010	1,085,100	635,860	698, 990

Note: citations provided in Section III of comments.